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April 21, 2003

Rosemary C. Smith
Acting Associate General Counsel for Policy
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

AOR 2003-14

Re: Advisory Opinion Request

Dear Ms. Smith:

On behalf of The Home Depot, Inc., I hereby request an advisory opinion pursuant to the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 437f, and Federal Election Commission ("the Commission") regulations, 11 C.F.R. § 112. Specifically, I request that the Commission confirm that The Home Depot's separate segregated fund, The Home Depot Better Government Committee ("Home Depot PAC"), may (1) distribute a pin bearing the name of the PAC to members of the restricted class as a token of appreciation for making a contribution, and (2) that the wearing of this pin would not constitute a solicitation within the meaning of 2 U.S.C. § 441b.

Facts

The Home Depot PAC would like to distribute a pin to members of its restricted class as a token of appreciation for making a contribution to the PAC. The pin would be approximately one and one-half inches long. The pin would depict the dome of the U.S. Capitol atop the familiar orange square Home Depot logo. The word "PAC" would appear below the orange square. Several images of the pin in various sizes are attached as Exhibit A. The smaller image in the lower left-hand corner is a life-size image of the pin. A much larger image of the pin is also provided for clarity of detail.

The Home Depot PAC pin would be sent to members of the restricted class attached to a backing card mailed to each contributing member's home address. See Exhibit B. The card would thank the members of the restricted class for their contributions to the PAC and include the statement, "Please accept the attached pin as a token of thanks for your support of the Home Depot PAC." There would be no further communication from either The Home Depot or the Home Depot PAC to the members of the restricted class regarding the PAC pin. Neither The Home Depot nor the Home Depot PAC will encourage members of the restricted class to wear the PAC apron pins.

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Given the role of apron pins in The Home Depot's corporate culture, however, it is foreseeable that an undetermined number of pin recipients will attach the PAC pin to their Home Depot shop aprons. It is also foreseeable that an undetermined number of pin recipients would then wear their shop aprons at corporate events or in the workplace where the PAC pin would be visible to individual members of the unrestricted class and, in rare circumstances, members of the general public.

In order to determine whether the wearing of this apron pin constitutes a solicitation within the meaning of FECA, it is important to understand the context in which the pin may appear. Every Home Depot employee, from individual store employees to members of senior management, is issued an orange shop apron when they join The Home Depot. Store employees are required to wear their shop aprons every day so customers seeking assistance can readily identify them. The Home Depot PAC estimates that less than 6% of the PAC apron pins will be distributed to store employees. An unknown but obviously smaller subset of these store employees are expected to actually wear the PAC apron pin on their shop aprons. The Home Depot's corporate managers, who make up the overwhelming majority of the Home Depot PAC's restricted class, are not required to wear their shop aprons on a daily basis. Many managers do, however, don their shop aprons four times a year for ceremonial purposes at quarterly corporate meetings. The Home Depot PAC estimates that more than 94% of the PAC apron pins will be distributed to members of the restricted class who wear their shop aprons only on these ceremonial occasions. The number of members of this subset of the restricted class who will actually wear the PAC apron pin on their shop aprons at these events is also unknown.

The distribution of apron pins is a significant part of The Home Depot corporate culture. Home Depot employees receive apron pins from a number of different sources and for a wide variety of reasons. The Home Depot issues a significant number of apron pins to all of its employees to reflect the company's values. All Home Depot employees, for example, were given a "Standing United" apron pin on September 11, 2002 to commemorate the one-year anniversary of the terrorist attacks on the World Trade Center and the Pentagon. Similarly, all Home Depot employees were issued a pin depicting the company's mascot, Homer, holding an American flag to demonstrate the company's support for Home Depot employees serving in the military. All Home Depot employees participate in an initial orientation and training program to familiarize them with the company's personnel goals and values. Employees who successfully complete this training program receive a "Living the Values" apron pin and an "Inclusion and Diversity" apron pin.

The Home Depot also issues apron pins to all of its employees to symbolize various corporate sponsorships. The Home Depot is a sponsor of the Tony Stewart NASCAR racing team. When Tony Stewart won the NASCAR Winston Cup Championship in 2002, The Home Depot issued a Tony Stewart Winston Cup Championship apron pin to all Home Depot employees. Similarly, The Home Depot has been a major sponsor of the U.S. Olympic team for many years. All Home Depot employees were issued apron pins recognizing the company's support of the U.S. Olympic Team in the 1998 Nagano Olympic Games, the 2000 Sydney Olympic Games and the 2002 Salt Lake City Olympic Games.

Like many other U.S. companies, The Home Depot also issues apron pins to employees to acknowledge years of service and specialized training. All Home Depot employees receive service pins when they reach the two-year, five-year, and ten-year milestones in their career with The Home Depot. The company also awards apron pins to employees who gain an expertise in a particular area, including electrical work, millwork, and plumbing. Many companies who distribute their products through The Home Depot also award apron pins to Home Depot employees who complete training classes involving that particular company's products. The list of outside suppliers who award apron pins to Home Depot employees includes John Deere, Rigid Tools, Ryobi Tools, and Behr Paints.

Finally, The Home Depot also recognizes community involvement by its employees by issuing apron pins to Home Depot employees who voluntarily participate in civic and charitable activities. Home Depot employees who volunteer to donate their time to paint a local playground, plant shrubs at a local school or build a home for a needy family receive a "Team Depot" apron pin. Home Depot employees who volunteer to help with Habitat for Humanity or City of Hope can also receive separate apron pins from those organizations. Home Depot employees can also receive an apron pin for making a monetary contribution to the Homer Fund. The Homer Fund is an independent charity that provides short-term financial assistance to Home Depot employees who encounter hardship due to catastrophic circumstances beyond their control.

The Home Depot's long tradition of issuing apron pins to its employees means that it is not at all unusual for any given employee to display five, ten, fifteen, twenty or even more apron pins on his or her shop apron. The Home Depot PAC pin would, therefore, be a small addition to the pin collections of many recipients. The Home Depot will neither encourage nor discourage its employees from wearing the Home Depot PAC pin on their shop aprons. Given the limited distribution of the pins to members of the restricted class, and the fact that most members of the restricted class only wear their shop aprons at four corporate events per year, it is unlikely that the Home Depot PAC pin will be seen by a significant number of individuals who are outside the Home Depot PAC's restricted class.

The Proposed Home Depot PAC Apron Pin Does Not Constitute a Solicitation Within the Meaning of 2 U.S.C. § 441b

As far as we have been able to determine, the Commission has only considered the issue of whether or not a PAC pin constitutes a solicitation on one previous occasion. On September 29, 1989, the Commission received an advisory opinion request from the First Florida Partners for Good Government ("FFP PAC"), the separate segregated fund of First Florida Banks, Inc. ("the Bank"). FFP PAC asked whether it would be permissible for FFP PAC to distribute to contributors a lapel pin depicting the Capitol buildings in Washington, D.C. and Tallahassee, Florida with the phrases "First Florida Partners for Good Government" and "I BACK THE PAC" appearing around the circumference of the pin. Advisory Opinion Request 1989-24. FFP PAC stated that the lapel pins would only be distributed to members of FFP PAC's restricted class.

FFP PAC also stated that while the Bank would not have a policy concerning the wearing of the pin on bank premises, FFP PAC would encourage employees to wear the lapel pin in the workplace. FFP PAC also stated that the decision to wear the lapel pin outside of the Bank's premises would be a personal decision for each employee. FFP PAC then asked whether the wearing of the lapel pin under these conditions would constitute a solicitation.

In response to Advisory Opinion Request 1989-14, the Commission's General Counsel prepared a draft advisory opinion that was considered as Agenda Document #89-98 at a Commission meeting on November 16, 1989. Commissioner Lee Ann Elliott submitted an alternative draft advisory opinion that was also considered on November 16, 1989 as Agenda Document #89-98-A.

The General Counsel's draft advisory opinion stated that the standard for determining whether the proposed PAC pin constituted a solicitation was whether the pin was a communication that "merely informs the reader, or encourages support of the fund or facilitates contributions to it." Agenda Document #89-98 at 3 (citing Advisory Opinions 1988-2, 1983-38, 1982-65, 1980-65, 1979-66, and 1979-13). The General Counsel concluded that by "distributing pins with the phrase, 'I BACK THE PAC,' and encouraging employees to wear them, the bank and the PAC are soliciting contributions from those who see the pin worn." *Id.* at 4. The General Counsel concluded that including the phrase "I BACK THE PAC" on the pin converted it from "the passive conveyance of information as to the existence of the PAC" into an impermissible message encouraging "support for the PAC, support which is manifested in contributions to the PAC." *Id.* at 4-5. The General Counsel concluded, however, that a solicitation would not occur if the phrase "I BACK THE PAC" were to be removed. Wearing a lapel pin that merely bore the name of the PAC "may engender inquiries, [but] it would no longer contain a message encouraging support of the fund." *Id.* at 5.

Commissioner Elliott's alternative draft advisory opinion would have gone further and allowed FFP PAC to distribute the lapel pins without removing the "I BACK THE PAC" phrase from the face of the pin. Agenda Document #89-98-A. The alternative draft stated that the Commission had long concluded that "a corporation's or a separate segregated fund's communications regarding a PAC's activity is not a solicitation under section 441b when the information provided would neither encourage readers to support a separate segregated fund's activity nor facilitate the making of contributions to it." *Id.* at 1 (citing Advisory Opinions 1988-2, 1983-38, 1982-65, and 1979-13). The alternative draft noted that in both Advisory Opinion 1983-38 and Advisory Opinion 1982-65, the Commission had approved the distribution of corporate newsletters announcing or publicizing a company's PAC to corporate employees outside the company's restricted class. These newsletter articles were found not to be solicitations because, while they might engender some inquiries about the PAC from company employees, they placed the burden on the reader to request further information about the PAC. *Id.* at 2. The alternative draft also noted that the Commission had previously authorized a labor organization PAC to distribute jackets bearing the PAC's insignia to members of the PAC's restricted class in exchange for a contribution to the PAC. *Id.* (citing Advisory Opinion 1981-7). The alternative draft concluded that the distribution of the FFP PAC lapel pins would not

constitute a solicitation because "wearing the pins is an individual choice" and the "pins neither describe the PAC's activity nor give information on how or where to contribute." *Id.* at 2-3. Because the wearing of the pins was not a solicitation, it was "immaterial that persons outside the solicitable class of the bank may see the bank personnel wearing the pins." *Id.* at 3.

The Commission did not approve the General Counsel's draft advisory opinion. The vote on Agenda Document # 89-98 was two in favor and four opposed. The alternative draft advisory opinion was discussed, but not voted upon. Letter from N. Bradley Litchfield, Associate General Counsel, to Kay Yarbrough, Secretary/Treasurer, First Florida Partners for Good Government (November 22, 1989). Commissioner McDonald subsequently issued a statement for the record stating that he voted against Agenda Document #89-98 because the PAC's management strongly encouraged the wearing of pins in the workplace that symbolize an employee's monetary contributions to the bank's PAC. Under those circumstances, the wearing of the pins was potentially coercive. Chairman McDonald's Statement for the Record in Advisory Opinion Request 1989-24 (December 11, 1989).

The Home Depot PAC's proposal for distributing PAC apron pins to members of its restricted class is materially different in a number of major respects than the situation described by the FFP PAC in Advisory Opinion Request 1989-24. First and foremost, the proposed Home Depot PAC apron pin will not include any language explicitly encouraging support for the PAC. The only printing on the pin will be a shortened version of the PAC's full name. Accordingly, the Home Depot PAC apron pin is more analogous to the jackets bearing a labor organization PAC's insignia that the Commission approved in Advisory Opinion 1981-7 than the lapel pin bearing the phrase "I BACK THE PAC" that the Commission would not approve in Advisory Opinion Request 1989-24.

Second, neither The Home Depot nor the Home Depot PAC will encourage members of the restricted class to wear the PAC apron pins. The Home Depot PAC apron pin will be sent to members of the restricted class attached to a backing card that includes the statement, "Please accept the attached pin as a token of thanks for your support of the Home Depot PAC." See Exhibit B. There would be no further communication from either The Home Depot or the Home Depot PAC to the members of the restricted class regarding the PAC pin. Individual members of the restricted class who receive the PAC apron pin will then make an individual choice about whether or not to wear the PAC apron pin.

Third, the Home Depot PAC apron pin is much less likely to be seen by employees outside the PAC's restricted class than the "I BACK THE PAC" pin the FFP PAC proposed to distribute in Advisory Opinion Request 1989-24. Because of the nature of the banking business, a bank PAC tends to have a very large restricted class. A majority of bank employees have policymaking, managerial, professional or supervisory responsibilities and therefore qualify as executive and administrative personnel who can be solicited by the bank's PAC at anytime. Advisory Opinion Request 1989-24 clearly envisioned a situation in which many members of the restricted class wearing PAC lapel pins would be interacting on a regular, perhaps daily, basis with employees outside the restricted class and, indeed, with the general public.

In contrast, The Home Depot is one of the nation's largest retailers. While it has a very large number of employees, the overwhelming majority of them are hourly employees and therefore outside of the restricted class. The Home Depot PAC estimates that its restricted class includes less than 5% of all Home Depot employees. The ratio of restricted class members to hourly employees means that the Home Depot PAC pin is unlikely to be seen by very many employees outside the restricted class and only in rare circumstances would it be seen by a member of the general public. The Home Depot PAC estimates that less than 6% of the PAC apron pins will be distributed to store employees. An unknown but obviously smaller number of these employees are expected to actually wear the PAC apron pin on their shop aprons. In contrast, the Home Depot PAC estimates that more than 94% of the PAC apron pins will be distributed to members of the restricted class who wear their shop aprons only four times a year for ceremonial purposes at quarterly corporate meetings. The number of members of this subset of the restricted class who will actually wear the PAC apron pin on their shop aprons at these events is unknown, but, again, obviously smaller than the total number of pin recipients.

Fourth, even if the Home Depot PAC apron pin were to be seen by an employee outside the restricted class, it is doubtful that the pin would be interpreted as encouraging support for the PAC. The "I BACK THE PAC" lapel pin that the FFP PAC proposed to distribute both explicitly and implicitly encouraged support for the FFP PAC. The pin contained an explicit statement supporting the PAC and was designed to be worn individually on a business suit so that it would attract the attention of anyone meeting the wearer. Commissioner McDonald voted against a modified version of the FFP PAC lapel pin that did not include the "I BACK THE PAC" phrase because he felt that, even without this express statement, the "specific identification of PAC contributors in the work place renders those who choose not to participate much more conspicuous. This places added pressure on non-participating employees to contribute to the PAC" Chairman McDonald's Statement for the Record in Advisory Opinion Request 1989-24 (December 11, 1989).

In contrast, the Home Depot PAC apron pin contains no express statement of support, only a shortened version of the PAC's full name. The Home Depot PAC apron pin will also appear in a totally different context than the lapel pin in Advisory Opinion Request 1989-98. Those Home Depot employees who tend to wear apron pins tend to wear many of them. Because of The Home Depot's long tradition of issuing apron pins, it is not at all unusual for an employee to display five, ten, fifteen, twenty or even more apron pins on his or her shop apron. The Home Depot PAC pin would, therefore, be just one of many pins and there is no reason to believe that it would attract the individualized attention of anyone meeting the wearer. Moreover, in this context, it is doubtful that even if the viewer actually noticed the PAC apron pin that it would be interpreted as an indication that the wearer had made a contribution to the PAC. The Home Depot distributes a wide variety of apron pins to its employees for a wide variety of reasons. Some are earned for years of service, specialized training or participation in a special Home Depot program. Others are given out to reflect corporate sponsorships or to commemorate special events. An employee outside of the restricted class would have no way of knowing that the Home Depot PAC apron pin indicates that the wearer has made a contribution

to the PAC.¹ Finally, since the overwhelming majority of Home Depot employees are not members of the restricted class and will not, therefore, receive Home Depot PAC apron pins, there is no reason to believe that those who fail to have such pins will be rendered “much more conspicuous” and feel pressure to contribute to the PAC.

Finally, it should be noted that in the nearly fourteen years since Advisory Opinion Request 1989-24, the Commission has gradually expanded the amount of information regarding a PAC that can be included in a communication to employees outside the restricted class without that communication being considered a solicitation. In Advisory Opinion 2000-7, the Commission allowed the following message to be posted on a company intranet visible to all employees regardless of whether or not they were members of the company’s restricted class:

Alcatel USA, Inc. supports the operation of the Alcatel USA, Inc. Political Action Committee (“the Alcatel PAC”) as authorized by, and in accordance with, federal law. Under applicable law, participation in the Alcatel PAC is limited to only those Alcatel USA employees who hold high-level administrative, executive or managerial responsibilities in the U.S. The Alcatel PAC funds are used to make contributions to candidates for federal office. Under applicable law, the amounts that may be contributed to and by a PAC are limited, and steps must be taken to ensure that employee contributions to the PAC are strictly voluntary and without coercion. The Executive Committee of the Alcatel PAC decides what federal candidates merit consideration for contributions. Employees desiring additional information on their eligibility or about the activities of the Alcatel PAC may contact Alcatel USA Political Action Committee, 1000 Coit Road, Plano, TX 75075, Attention: [name, phone number and e-mail address of Alcatel PAC official].

In deciding to allow this message to be disseminated to employees outside Alcatel’s restricted class, the Commission used precisely the same standard that Commissioner Elliott used in Agenda Document #89-98-A: “whether the language or information provided would either encourage readers to support an SSF’s activities or facilitate making contributions to the SSF.” The Commission concluded that this statement did not constitute a solicitation because the statement “merely conveys information that might engender inquiry; it is not an encouragement to contribute.”

¹ In a different First Amendment context, the Supreme Court has indicated that the meaning of a symbol can be diluted when displayed as one among many other symbols. *Lynch v. Donnelly*, 465 U.S. 668 (1984)(city’s Christmas display did not violate the Establishment Clause of the First Amendment when the display included a creche along with many other traditional symbols of the Christmas season, including, among other things, a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, and cutout figures representing such characters as a clown, an elephant and a teddy bear.)

The Home Depot PAC apron pin is considerably less likely to engender an inquiry regarding the Home Depot PAC than the statement on Alcatel's intranet authorized in Advisory Opinion 2000-7. Consider the sequence of events that would have to occur before a Home Depot PAC apron would even engender an inquiry about the PAC: (1) a member of the Home Depot PAC's restricted class makes a contribution to the PAC, (2) the PAC sends the contributor a Home Depot PAC apron pin, (3) the contributor attaches the Home Depot PAC apron pin to his or her shop apron, (4) the contributor wears his or her shop apron with the Home Depot PAC apron pin attached in a situation where it is visible to a Home Depot employee who is not a member of the Home Depot PAC's restricted class, (5) The Home Depot employee notices the Home Depot PAC apron pin among five, ten, fifteen, twenty or even more pins on the contributor's shop apron, (6) the viewer guesses that wearing the Home Depot PAC apron pin means that the wearer has made a contribution to the Home Depot PAC, and (7) the employee asks the wearer how to make a contribution to the Home Depot PAC.

Unlike the "I BACK THE PAC" lapel pin in Advisory Opinion 1989-24, the Home Depot PAC apron pin contains no express statement of support for the PAC, merely a shortened version of the PAC's name. Neither The Home Depot nor the Home Depot PAC will encourage members of the restricted class to wear the PAC apron pins. The Home Depot PAC estimates that more than 94% of the Home Depot PAC apron pins that will be distributed will go to members of the restricted class that only wear their shop aprons four times a year for corporate events, so it is unlikely that the apron pin will be seen by very many employees outside the restricted class and only in rare circumstances would it be seen by a member of the general public. The "message" of the Home Depot PAC apron pin, if any, considered in the context in which it may appear, is, at best, ambiguous even when compared to the FFP PAC lapel pin without its "I BACK THE PAC" language.

The Home Depot PAC apron pin simply fails to meet the Commission's standard for a PAC communication that "would either encourage readers to support an SSF's activities or facilitate making contributions to the SSF." Advisory Opinion 2000-7. The Commission should issue an advisory opinion confirming that (1) the Home Depot PAC may distribute the pin to members of the restricted class as a token of appreciation for making a contribution, and (2) that the wearing of the pin would not constitute a solicitation within the meaning of 2 U.S.C. § 441b.

Sincerely,



Brett G. Kappel

For Powell, Goldstein, Frazer & Murphy LLP



File: Home Depot Capitol
V61

Sales: Bob

Date: 02-07-83

Exhibit A



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